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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-857

J. W. PATTERSON, JOSEPH W. PERRIN, and ROBERT E. McCLAY, individually and as former officials of Eastern Correctional Facility; and BENJAMIN WARD and PETER PREISER, as present and former Commissioners of Corrections of the State of New York,

Petitioners,

against

KHALIEB McKINNON, LAURENCE MINCY and DAVID WHEELER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, J. W. Patterson, Joseph W. Perrin, and Robert E. McClay, individually and as former officials of the Eastern Correctional Facility, and Benjamin Ward and Peter Preiser, as present and former Commissioners of Corrections of the State of New York, pray that a writ of certiorari issue to review a decision of the United

States Court of Appeals for the Second Circuit in the case of Khalieb McKinnon, Laurence Mincy and David Wheeler, against J. W. Patterson, Joseph W. Perrin, and Robert E. McClay, individually and as former officials of Eastern Correctional Facility; and Benjamin Ward and Peter Preiser, as present and former Commissioners of Corrections of the State of New York dated September 15, 1977, which affirmed as modified a judgment of the District Court.

Opinion Below

The decision of the Court of Appeals is not reported and is reproduced herein as Appendix A. The decision of the District Court is reported at 425 F. Supp. 383 and is reproduced herein as Appendix B.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The decision of the Court of Appeals is dated September 15, 1977.

Questions Presented

1. Is the Court of Appeals' retroactive application of *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), in direct conflict with decisions of this Court?
2. Did the Court of Appeals improperly impose a *Wolff* requirement on keeplock and improperly extend *Wolff* beyond the scope of this Court's decisions?

Statement of the Case

On June 5, 1973, a "Sit-in" or work stoppage was staged by several dozen inmates at the prison laundry at Eastern New York Correctional Facility, Napanoch, New York.

According to the unanimous view of prison officials, the inmates in the laundry wanted to do "contract" laundry, or laundry for other inmates for a price and profit. This was against prison rules. An inmate rulebook in existence at the time, and circulated in the ordinary course of business to all inmates, contained a prohibition against "contract" laundering.

Following the refusal of the inmates in the laundry to return to work, the respondents were ordered keeplocked. However, the keeplock was postponed until after the lunch period to avoid the possibility of a disturbance in the laundry room.

All three respondents* appeared before the Adjustment Committee on June 7, 1973.** Mincy admitted at trial*** that he was notified of the charge against him and was asked if he had anything to say. McKinon admits that he was shown a copy of the charges against him, the same copy a Lieutenant read out loud. Wheeler admitted that he was told what he was accused of at his Adjustment Committee hearing.

The three respondents were keeplocked for fifteen days. McKinnon testified that he showered "about twice" and had recreation of periods of approximately one hour on

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* Respondent Wheeler was paroled on July 30, 1975. Respondent Mincy was paroled on March 11, 1977. Respondent McKinnon is incarcerated at the Green Haven Correctional Facility and is due to meet the Parole Board in January 1978.

** The Adjustment Committee is established pursuant to 7 New York Code of Rules & Regulations Part 252. Its purpose is to ascertain the facts of inmate misbehavior and to counsel inmates. It can impose a loss of privileges up to thirty days or confine an inmate to his cell (keeplock) for a period up to fourteen days.

Serious misbehavior with resultant confinement to a disciplinary cell (segregation) or loss of good time is considered by a Superintendent's Proceeding. 7 NYCRR Part 253.

*** This case was tried before the District Court on May 24, 25 and 26, 1976.

three or four separate occasions. He had his own personal belongings, reading matter and running water. Mincy and Wheeler had similar experiences. Mincy was twice allowed to leave his cell to attend to his responsibilities on the inmate Liason Committee.

The District Court, after a three day trial, denied most of respondents' claims for relief. However, the Court did rule that fourteen days of keeplock was a substantial deprivation and that respondents' Adjustment Committee interviews were unconstitutional under *Sostre* v. *McGinnis,* 442 F. 2d 178 (2d Cir. 1971) *cert. denied,* 404 U.S. 1049 (1972). The Court ordered that in all future cases involving keeplock inmates must be given written notice of charges 24 hours in advance of the Adjustment Committee hearing and that no correction official with personal involvement in an incident could sit on any Adjustment Committee hearing charges relating to that incident.

Petitioners appealed to the Court of Appeals only from that portion of the District Court judgment requiring 24 hours advance written notice of charges in Adjustment Committee cases involving keeplock.

Respondents cross-appealed from so much of the District Court judgment that denied their requests for monetary relief and expunction.

The Court of Appeals upheld the District Court's refusal to grant monetary relief or to order expunction of respondents' records.

Although holding in a footnote that "candor" compelled it to indicate that the hearings at issue were probably proper when they were held in 1973 because the controlling case then was *Sostre* v. *McGinnis, supra,* and because the "deprivation visited upon these plaintiffs was far milder than those in our early cases dealing with prisoners' rights", Appendix, pp. 6a-8a, n. 3, the Court of Appeals continued to grant respondents a declaratory

judgment under *Wolff* v. *McDonnell,* 418 U.S. 539 (1974). According to the Court of Appeals, respondents are entitled to 24 hours advance written notice of charges to be heard by the Adjustment Committee.

The Court reasoned that "the deprivations involved in keeplock are essentially the same as those involved in segregation in a special housing unit", Appendix, p. 13a, and that keeplock, therefore, was "disciplinary confinement", or "soliary" under *Wolff* v. *McDonnell, supra.*

The Court reasoned that the deprivations involved not only the type of confinement but also the length of the confinement and that fourteen days keeplock was a substantial deprivation.

Reasons Why Certiorari Should Be Granted

A. The Court of Appeals' Retroactive Application of *Wolff* v. *McDonnell* is in Direct Conflict with Decisions of this Court

The only facts before the Court of Appeals concerned a prison laundry riot in June, 1973. A class was never certified. The Court indicated that it believed that the law in 1973 did not require advance written notice prior to an Adjustment Committee hearing.* (Appendix, pp. 6a-8a, n. 3). Yet it went on to apply *Wolff* v. *McDonnell, supra,* to the 1973 incident and the resulting prison proceeding.

This retroactive application of *Wolff* directly contravenes this Court's instructions in *Wolff,* at 573-74.

In *Cox* v. *Cook,* 420 U.S. 734 (1975) (*per curiam*) this Court reiterated that *Wolff* is not to be applied retro-

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* The Court could not have concluded otherwise, since as it noted, *Sostre* v. *McGinnis, supra,* "did not mandate *advance* notice, let alone written notice 24 hours in advance of the hearing." Appendix, p. 7a, n. 3).

actively when claims for monetary relief or expunction are at issue.

The granting of declaratory relief by the Court of Appeals does not remove the strictures of the non-retroactivity rule. The 1973 incident was the only one before the Court. The change of law that occurred with *Wolff* made respondents' request for a declaratory judgment with respect to the pre-*Wolff* incident moot. Respondents made no claim or demonstration of facts with respect to post-*Wolff* incidents. The Court of Appeals, therefore, impermissibly applied *Wolff* retroactively.

B. The Court of Appeals Improperly Imposed a *Wolff* Requirement on Keeplock and Improperly Extended *Wolff* Beyond the Scope of this Court's Decisions

Assuming *arguendo* that it is proper to apply *Wolff* to a 1973 incident, it was applied improperly by the Court of Appeals.

Keeplock is not a grievous loss covered by *Wolff* and is not a substantial deprivation within the meaning of the Due Process Clause of the Fourteenth Amendment. Respondents were in their own cells, not a special disciplinary cell. They were permitted showers, recreation and a regular diet. They retained their personal belongings, reading matter and radio. One respondent was allowed out of his cell to attend committee meetings. No loss of good time was demonstrated.

In *Wolff* this Court ruled that its decision should apply to situations involving loss of good time or confinement in a disciplinary cell, punishments authorized for serious misconduct under Nebraska law. This Court took pains to indicate that the *Wolff* procedures did not necessarily apply where "lesser penalties" were involved.

Although, in *Wolff*, this Court did not define definitively the nature of "lesser penalties,"* it was suggested that it might encompass loss of privileges and non-major changes in conditions of confinement, *Wolff* v. *McConnell, supra,* 418 U.S. at 571, n. 19.

The issue of what process applies to "lesser penalties" again was explicitly left open by this Court in *Baxter* v. *Palmigiano,* 425 U.S. 308, 323 (1976).

Pursuant to 7 NYCRR 252.3(e), the Adjustment Committee is required to obtain from the inmate an explanation of his behavior. Informal notice thus is contemplated. Respondents here all admitted being informed of the charges against them. No one claimed he did not understand them. All admitted being given an opportunity to respond.

The Court of Appeals' ruling imposes on New York's prison system a formalization unwarranted and unjustified by the facts of this case. It goes a substantial distance in obliterating the difference between the Superintendent's Proceeding and the Adjustment Committee proceeding. The latter is reserved for less serious offenses and penalties and can impose, at the most, fourteen days keeplock. Remedial and guidance objectives are as much a part of the Adjustment Committee System as "discipline". See 7 NYCRR 252.2(d), 252.4(c), 252.5(a), (b) and (c).

Imposing a twenty-four hour written notice rule in keeplock cases sacrifices flexibility and imposes Federal court rule-making on the daily administration of the prisons. The imposition of the rule does what this Court in *Meachum* v. *Fano,* 427 U.S. 215 (1976), warned against:

> "To hold as we are urged to do that any substantial deprivation imposed by prison authorities triggers

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* Nor did the record in *Wolff* indicate what was meant by "deprivation of privileges" under Nebraska law, *Wolff* v. *McDonnell, supra,* 418 U.S. at 547, n. 7.

the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administration rather than of the federal courts."

427 U.S. at 225.

Thus, this case squarely presents the issue of the nature of "lesser penalties" under *Wolff*, whether 24 hour advance written notice is required before such "lesser penalties" may be imposed, and how deeply into the daily functioning of a State prison the Federal courts should intrude. These issues have not been decided by this Court and should be decided now.

CONCLUSION

Petitioners' application for certiorari should be granted and the decision of the Court of Appeals summarily reversed or plenary review granted.

Dated: New York, New York
December 8, 1977

Respectfully submitted,

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Appendix A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 820, 821—September Term, 1976.

(Argued March 18, 1977 Decided September 15, 1977.)

Docket Nos. 76-2153, 76-2168

KHALIEB MCKINNON, LAURENCE MINCY
and DAVID WHEELER,

Plaintiffs-Appellees and Cross-Appellants,

v.

J. W. PATTERSON, JOSEPH W. PERRIN, and ROBERT E. MCCLAY, individually and as former officials of Eastern Correctional Facility; and BENJAMIN WARD and PETER PREISER, as present and former Commissioners of Corrections of the State of New York,

Defendants-Appellants and Cross-Appellees.

Before:

LUMBARD and TIMBERS, *Circuit Judges*,
and DAVIS,* *Court of Claims Judge.*

Cross-appeals by state prisoners and state prison officials from judgment entered in civil rights action in the South-

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* Hon. Oscar H. Davis, *Judge*, United States Court of Claims, sitting by designation.

Appendix A.

ern District of New York, Charles E. Stewart, *District Judge*, 425 F. Supp. 383, which granted declaratory relief with respect to certain constitutional infirmities the court found in prison disciplinary proceedings but denied monetary relief.

Affirmed as modified.

GAGE ANDRETTA, New York, N.Y. (Richard A. Fuchs, New York, N.Y., on the brief), *for Plaintiffs-Appellees and Cross-Appellants.*

RALPH MCMURRY, Assistant Attorney General, New York, N.Y. (Louis J. Lefkowitz, Attorney General, State of New York, and Samuel A. Hirshowitz, First Assistant Attorney General, New York, N.Y., on the brief), *for Defendants-Appellants and Cross-Appellees.*

TIMBERS, *Circuit Judge:*

These are cross-appeals by state prisoners and state prison officials from a judgment entered October 12, 1976 in the Southern District of New York, Charles E. Stewart, *District Judge*, 425 F.Supp. 383, which granted declaratory relief with respect to certain constitutional infirmities the court found in prison disciplinary proceedings but denied monetary relief.

One of the essential questions presented is whether and to what extent the rule of *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), requiring 24-hour advance written notice of charges in certain prison disciplinary proceedings, applies to proceedings in which the sanction for misbehavior may be "keeplock" of not more than two weeks. We affirm the judgment as modified.

Appendix A.

I. FACTS AND PRIOR PROCEEDINGS

The events that gave rise to this action began on June 5, 1973 in the laundry room of Eastern Correctional Facility at Napanoch, New York. Eastern is a medium security prison. The three prisoners named as plaintiffs were assigned to work in the laundry room. On June 5 a dispute took place between prisoners in the laundry room and certain corrections officials. Just what caused the dispute remains unclear: the prisoners contend that the officials would not let them do "personal" laundry, while the officials say the prisoners were violating prison rules by attempting to do "contract" laundry, or laundry for other inmates for a profit. For our purposes the underlying cause of the dispute is irrelevant. The relevant thing was the result. The prisoners in the laundry room refused to work; and after lunch that day they were confined to their cells ("keeplocked").

By the following day some of the prisoners had been interviewed by prison personnel and released from keeplock. Their misbehavior reports were withdrawn. Other prisoners, including plaintiffs, were kept in keeplock and their misbehavior reports were sent to the Adjustment Committee. The Committee met and held hearings on June 7. The prisoners were informed of the charges against them at their individual hearings, but not before; and they were given an opportunity to respond. The Committee imposed on each prisoner, including plaintiffs, punishment of seven days keeplock. Although each prisoner was told he would be reinterviewed (or given a "review") after seven days, 7 N.Y. Code of Rules and Regulations § 252.5(f) (1973), none of the plaintiffs was given a second interview. They were kept in keeplock for two weeks.

In keeplock plaintiffs were confined to their own cells 23 to 24 hours a day. They were denied contact with other

inmates and could not participate in the normal routine of the institution, were not allowed to work at their jobs or earn wages, and had limited access to showers and physical activity.

The Program Committee, which is responsible for inmate assignments, met on June 8 and recommended that plaintiffs be transferred out of Eastern. After the recommendations were approved by defendant Patterson, then Superintendent of Eastern, the transfers were approved by defendant Preiser, then Commissioner of Corrections. At the end of June, each of the plaintiffs was transferred to a different maximum security institution. Defendant McClay, then Deputy Superintendent of Eastern, testified that the Program Committee's recommendations "could have" been based on the Adjustment Committee's determinations the day before.

In their action commenced September 19, 1973, plaintiffs claimed that they had been deprived of their constitutional rights guaranteed by the First and Fourteenth Amendments in violation of 42 U.S.C. § 1983 (1970). The parties agree that of the five claims asserted only the first is relevant to the instant appeals. In that claim plaintiffs alleged that they had been punished, by confinement in keeplock and then by transfer to maximum security prisons, without adequate notice or hearings, in violation of the due process clause of the Fourteenth Amendment. They requested declaratory and injunctive relief, expungement from their records of any mention of the laundry incident, and monetary damages from all defendants except defendant Ward who became Commissioner after the events in question.

Following a three day trial in May 1976 the district court filed its opinion which ordered dismissal of all of plaintiffs' claims, except the one stated above, the first claim. Plaintiffs have not appealed with respect to the dismissed

claims. As to the first claim the court held that plaintiffs had no right to a hearing before being transferred to other facilities, citing the Supreme Court's recent decisions in *Meachum* v. *Fano*, 427 U.S. 215 (1976), and *Montayne* v. *Haymes*, 427 U.S. 236 (1976); but it held that the hearings given plaintiffs were constitutionally inadequate because the Adjustment Committee was not an impartial tribunal and because plaintiffs did not receive adequate notice of the charges against them.[1] The court rejected plaintiffs' contention that the Adjustment Committee had breached New York regulations by failing to reinterview plaintiffs after seven days in keeplock. Accordingly, the court ordered that

> "in future adjustment committee proceedings involving keeplock, 1) formal written notification of the charges must be given to the inmate at least 24 hours before the hearing and 2) no one with direct, personal involvement in the incident upon which the complaint against the inmate is based may sit on that case." 425 F.Supp. at 393.

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[1] The court's holding on this point was as follows:

> "1) confining an inmate to his or her cell for two weeks is a substantial deprivation; 2) prior to the imposition of such deprivation, due process requires a fair hearing; and 3) that the procedures accorded to plaintiffs prior to keeplock violated their Foourteenth Amendment rights." 425 F.Supp. at 393.

We understand the court's decision, as to both the unconstitutionality of the hearings and the grant of relief, to have been based on *Sostre* v. *McGinnis*, 442 F.2d 178 (2 Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972). Whatever doubts there may be as to the specificity of *Sostre's* requirements as of 1973 when the Adjustment Committee hearings in question were held, see note 3 *infra*, we have analyzed plaintiffs' claim for declaratory relief under the law as it stands today, i.e. under *Sostre*, and the Supreme Court's decision in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), upon which the district court based its grant of relief.

Appendix A.

The court refused to award damages or to order that references to the laundry room incident be expunged from plaintiffs' records.

Plaintiffs appeal from so much of the judgment as denied their requests for monetary relief and expungement. Defendants appeal from so much of the judgment as requires them to give 24 hours advance written notice of charges before keeplock may be imposed and from the grant of relief to anyone other than the three named plaintiffs, insofar as the court's decision may be read to provide such relief.

II. Discussion

(A) Plaintiffs' Appeal

The two issues raised on plaintiffs' appeal are whether the district court erred in refusing (1) to award damages and (2) to order expungement. We hold that the court did not err in either respect.

(1) *Damages*

Plaintiffs contend that the court should have awarded damages for several distinct violations of their constitutional rights.[2] Assuming arguendo that plaintiffs' contentions regarding violations of their rights were meritorious,[3]

[2] Specifically the alleged violations for which plaintiffs sought damages were the constitutionally inadequate procedure at the Adjustment Committee hearings; discrimination among inmates in that some chosen at random were released from keeplock after informal interviwes and their misbehavior reports were withdrawn; failure to review plaintiffs' keeplock status after seven days as originally indicated; and the transfers to other institutions that allegedly resulted from the defective Adjustment Committee hearings.

[3] Candor compels us to note our doubts about the court's conclusion that the hearings afforded plaintiffs were unconstitutional

(footnote continued on following page)

Appendix A.

their appeal as to this issue must fail on other grounds. The district court was correct in refusing to award damages on the grounds that plaintiffs did not demonstrate the requisite personal involvement of certain of the defendants

(footnote continued from preceding page)

at the time they were held in 1973. The events in question antedated the Supreme Court's decision in *Wolff* v. *McDonnell, supra;* so the governing standard at the time was our own *Sostre* v. *McGinnis, supra.* Whether the hearings compiained of amounted to a denial of due process under *Sostre* is a debatable question, and one we need not resolve here. Its resolution would be of no more than academic interest. Our doubts spring from the fact that the opinion in *Sostre* was vague as to the minimal requirements of due process in the prison context; it specifically refused to impose a "constitutional harness" on state prison officials. 442 F.2d 178 at 197. The closest *Sostre* came to defining the rudiments of due process was the following, often quoted in subsequent decisions:

> "If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, . . . and afforded a reasonable opportunity to explain his actions." *Id.* at 198 (citations omitted).

Since *Sostre* did not mandate *advance* notice, let alone written notice 24 hours in advance of the hearing, and considering the relatively uncomplicated factual inquiry at the hearings in the instant case, it is not clear that the *Sostre* standard at the time of these hearings had evolved as far as plaintiffs claim.

Furthermore, the deprivation visited upon these plaintiffs was far milder than those in our early cases dealing with prisoners' rights. See, e.g., *Sostre, supra; Wright* v. *McMann,* 387 F.2d 519 (2 Cir. 1967). Indeed, in *United States ex rel. Walker* v. *Mancusi,* 467 F.2d 51 (2 Cir. 1972), we approved of Adjustment Committee hearings, as to which the prisoners were not given any advance written notice of the charges against them, which resulted in their confinement in a special housing unit. Although we either held implicitly or assumed for purposes of argument that such segre-

(footnote continued on following page)

in the alleged constitutional deprivations; and, as to the other defendants, plaintiffs failed to prove that they acted unreasonably or in bad faith so as to deprive them of official immunity.

In this Circuit personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983. *Mukmuk* v. *Commissioner of Department of Correction Services*, 529 F.2d 272, 275 (2 Cir.), *cert. denied*, 426 U.S. 911 (1976); *Johnson* v. *Glick*, 481 F.2d 1028, 1033-34 (2 Cir.), *cert. denied*, 414 U.S. 1033 (1973); *Sostre* v. *McGinnis*, *supra*, 442 F.2d at 205; see *United States ex rel. Larkins* v. *Oswald*, 510 F.2d 583, 588-89 (2 Cir. 1975); *Martinez* v. *Mancusi*, 443 F.2d 921, 924 (2 Cir. 1970).

We are satisfied that defendant Preiser, the former Commissioner of Corrections, was not sufficiently involved in the alleged denial of due process to subject him to personal liability.[4] There was no evidence that he participated directly in the Adjustment Committee hearings, that he had

(footnote continued from preceding page)

gation was a substantial deprivation under *Sostre*, we concluded that due process was satisfied when the Superintendent "reviewed each case, informed each inmate of the evidence against him, and gave him the opportunity to consent to continued restrictive confinement or to reply to the evidence against him." *Id.* at 53.

The district court's conclusion here that the hearings were inadequate, because of the presence on the Adjustment Committee of a corrections official who may have been involved in the laundry room incident is more tenable. See e.g., *United States ex rel. Neal* v. *Wolfe*, 346 F.Supp. 569, 575 (E.D.Pa. 1972); *Landman* v. *Royster*, 333 F.Supp. 621, 653 (E.D. Va. 1971). Still, although an impartial tribunal is a basic component of due process and was considered such in 1973, it is not clear that keeplock was considered a "substantial deprivation" under *Sostre* so as to mandate even minimal due process standards.

[4] Defendant Ward, the present Commissioner, was sued only in his official capacity for purposes of declaratory and injunctive relief. The damage issue therefore does not concern him.

knowledge of what went on at the hearings, that he had reason to suspect that there had been any wrongdoing, or that he had direct responsibility for or control over the Adjustment Committee. The fact that he was in a high position of authority is an insufficient basis for the imposition of personal liability. *Johnson* v. *Glick*, *supra*, 481 F.2d at 1034.

Nor are plaintiffs entitled to damages from the defendant officials who were at the prison (Superintendent Patterson and Deputy Superintendents Perrin and McClay). These defendants pleaded and proved that they acted reasonably and in good faith. They therefore were entitled to the defense of official immunity as to all but one of the alleged defects with which they could be said to have been personally involved. *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Mukmuk* v. *Commissioner of Department of Correctional Services*, *supra*; *Knell* v. *Bensinger*, 522 F.2d 720 (7 Cir. 1975). *Wood* v. *Strickland* held that an official seeking to avail himself of the defense of immunity "must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges." 420 U.S. at 322.

We are not convinced that the standard of *Wood* v. *Strickland* has been met here. At the time of the hearings in question the contours of prisoners' procedural rights were just starting to take shape. See note 3 *supra*. If the hearings were less than we consider constitutionally adequate today, it is because of the benefit of hindsight and particularly the guiding light of *Wolff* v. *McDonnell*. The cases which plaintiffs cite to indicate that the constitutional rights here in question clearly were established and unquestioned in June 1973 deal with forms of punishment harsher and of longer duration than two weeks in keeplock. These cases indicate that the courts were only beginning to fill in the details of procedural due process required in the context of prison discipline.

The alleged selective treatment of inmates stands on a different footing. *Wood* v. *Strickland,* and before it *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974), established a dual subjective/objective test of good faith.

> "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Scheuer* v. *Rhodes, supra,* 416 U.S. at 247-48.

Judge Stewart found that "because some inmates were interviewed and released under informal procedures, plaintiffs were deprived of their legal 'interest or right' under New York law to have prison discipline applied under established procedural mechanisms", citing *Meachum* v. *Fano, supra.* 425 F.Supp. at 393. The subjective test of good faith was not met. The judge concluded however that "while the activities of the ad hoc panel which interviewed some inmates and released them from keeplock cannot be characterized as a good faith attempt to comply with legal requirements, plaintiffs have not been damaged by those actions." *Id.* at 394. Accordingly he declined to award monetary damages.

We agree with that conclusion but not on the ground that plaintiffs were not damaged; rather, we hold that the defendants were not personally responsible for the actions of those who singled out some prisoners for more favorable treatment.

(2) *Expungement*

There is no doubt, as Judge Stewart found, that plaintiffs participated in the work stoppage. If the Adjustment Committee hearings had been preceded by proper notice, plaintiffs might have been able to prove that they were

coerced, were mere followers or passive participants, or had some other justifiable excuse. The same considerations which we have set forth above with respect to the claim for damages, however, apply likewise to the claim for expungement. The fact that the due process rights asserted by plaintiffs were not clearly established in 1973 cautions us against applying present standards "so as to require that prison records containing determinations of misconduct, not in accord with required procedures, be expunged." *Wolff* v. *McDonnell, supra,* 418 U.S. at 573-74.

We hold that the district court did not err in refusing to order expungement from plaintiffs' records of any mention of the laundry incident.

(B) Defendant's Appeal

The corrections officials press two main arguments on appeal. The first is directed at that provision of the judgment which requires 24 hours advance written notice of charges to be heard by the Adjustment Committee "involving keeplock". The second argument is that the same provision of the judgment is ambiguous and sweeps too broadly in that it seems to go beyond a declaration of rights to grant an injunction—an injunction not limited to plaintiffs despite the fact that this suit is not a class action.

(1) *Notice*

In order to determine whether the notice provision of the judgment below was proper we must interpret the scope of the notice requirement laid down in *Wolff* v. *McDonnell, supra.*[5] *Wolff* held that 24 hours advance written notice of

[5] We are not persuaded by defendants' argument that the district court impermissibly applied *Wolff* retroactively. Whatever may be said with respect to the application of *Wolff* standards to the 1973 hearing, notes 1 & 3 *supra*, the court's consideration of *Wolff* in the context of granting declaratory relief was proper.

the charges is required before a prisoner can be deprived of good time or placed in "'solitary' confinement" as punishment for "serious misbehavior". 418 U.S. at 571 n. 19. The Court qualified its holding by noting that solitary confinement

> "represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction. We do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges." *Id.* at 571-72.

In the instant case we must determine where keeplock falls on the spectrum between loss of privileges at one extreme and forfeiture of good time or placement in solitary confinement at the other.

We begin by attempting to clarify how keeplock fits into the range of types of disciplinary confinement. There are three basic forms of punitive segregation: (1) keeplock, or "padlock", in which the prisoner is confined to his own cell and is deprived of almost all contact with the rest of the prison population and participation in the normal routine of the institution; (2) confinement in a special housing unit, usually a maximum security cellblock or building; and (3) solitary confinement, including "strip cells" or "dry cells", which contain no sink or toilet. See *Wolff* v. *McDonnell, supra,* 418 U.S. at 552 n. 9; *LaReau* v. *MacDougall,* 473 F.2d 974, 976-78 & n. 7, and authorities cited at n. 7 (2 Cir. 1972), *cert. denied,* 414 U.S. 878 (1973); Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 Va. L. Rev. 841, 852 (1971). Obviously

keeplock is the mildest form of punitive segregation. Yet, except for the fact that the prisoner is confined to his own cell and retains access to his personal belongings, the deprivations involved in keeplock are essentially the same as those involved in segregation in a special housing unit. The district court here so found, 425 F.Supp. at 391; see also *Cunningham* v. *Ward,* 546 F.2d 481 (2 Cir. 1976) (per curiam).

Many cases have held that punitive segregation in a special housing unit constitutes a "substantial deprivation" or "grievous loss", *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 168 (1951), thereby triggering minimal due process requirements. E.g., *United States ex rel. Larkins* v. *Oswald,* 510 F.2d 583 (2 Cir. 1975); *United States ex rel. Miller* v. *Twomey,* 479 F.2d 701, 717 (7 Cir. 1973) (Stevens, *J.*), *cert. denied,* 414 U.S. 1146 (1974); *United States ex rel. Walker* v. *Mancusi,* 338 F.Supp. 311 (W.D.N.Y. 1971), *aff'd,* 467 F.2d 51 (2 Cir. 1972); *Diamond* v. *Thompson,* 364 F.Supp. 659, 664 (M.D. Ala. 1973); *Sands* v. *Wainwright,* 357 F.Supp. 1062, 1082, 1086 (M.D. Fla.), *vacated and remanded on other grounds,* 491 F.2d 417 (5 Cir. 1973) (en banc), *cert. denied,* 416 U.S. 992 (1974); *Bundy* v. *Cannon,* 328 F.Supp. 165, 173 (D. Md. 1971).

There are two problems, however, in relying on these cases to support a holding that keeplock of less than two weeks likewise is a substantial deprivation. First, it often is difficult to find a common denominator among the various terms used to describe different kinds of punishment and thereby to translate them into one language in which comparisons can be made. It may be that the forms of punishment considered in many pre-*Wolff* cases would fall under *Wolff's* definition of "solitary" confinement. On the other hand, it is arguable that even keeplock comes under *Wolff*. As we said in *Cunningham* v. *Ward, supra,* 546 F.2d at 483, "Footnote 19 in *Wolff* distinguishes be-

tween 'disciplinary confinement' and 'loss of privileges'; arguably keeplocking is a form of 'disciplinary confinement,' [that is, explicitly covered by the holding in *Wolff*], even though it is not '"solitary" confinement' as that term is generally understood."[6] Second, in trying to fit the instant case into the framework of the case law we note that here the Adjustment Committee did not have the power to impose keeplock for more than two weeks and in fact imposed keeplock on these plaintiffs for only seven days. We have not been able to find any other case in which the maximum segregation provided for by regulation was as short as two weeks. In most of the cases the prisoners were confined for "indeterminate" terms and many prisoners remained in punitive confinement for weeks and even months.

The provision of the district court judgment here under consideration therefore takes us further down the path than we heretofore have gone in defining "grievous loss" or "substantial deprivation". Keeplock appears to be a milder form of punishment than solitary confinement or confinement in a special housing unit. Adjustment Committees in New York prisons cannot impose it for more than two weeks. The question thus presented is whether these differences take keeplock out of the class of punishments covered by *Wolff*. We conclude that they do not. We reach this conclusion for three reasons, one based on our reading of *Wolff*, one based on our own prior cases, and one based on practical considerations.

Our interpretation of *Wolff* begins with a look at the Nebraska state regulation that authorized the disciplinary

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[6] We also observed in *Cunningham* that both the Supreme Court and our Court explicitly have left open the question whether even the penalty of loss of privileges may not be imposed without adequate procedural protections. *Id.* at 483; see *Baxter* v. *Palmigiano*, 425 U.S. 308, 323 (1976); *Mawhinney* v. *Henderson*, 542 F.2d 1, 3-4 (2 Cir. 1976).

sanctions there involved. It provided: "In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term . . . be forfeited or withheld and also that the person be confined in a disciplinary cell." 418 U.S. at 539 n. 5. The Court seems to have equated "disciplinary cell" with "solitary confinement", because it explained the former term more fully by describing the two forms of "solitary confinement" extant in Nebraska: "[The prisoner] may be incarcerated alone in the usual 'disciplinary cell,' with privileges severely limited, for as long as necessary, or he may be put in a 'dry cell'. . . ." *Id.* at 552 & n. 9. The Court contrasted these forms of punishment with the only other kind of punishment provided for by the Nebraska prison regulations: "If the misconduct is less than flagrant or serious, only deprivation of privileges results." *Id.* at 547. This leads us to the conclusion that unless keeplock, with its attendant sanction of loss of *all* or almost all privileges, is to be equated with "lesser penalties such as the loss of privileges", *id.* at 571-72 n. 19, keeplock qualifies under *Wolff*, as a form of "disciplinary confinement" (referred to alternatively by the Court as "'solitary' confinement"). See also *Mawhinney* v. *Henderson*, *supra*, 542 F.2d 1, 4 (2 Cir. 1976).

Turning to our own cases, we have intimated that the differences in nomenclature among the various forms of punitive (or disciplinary) confinement should not be dispositive in determining whether minimal due process is required. First, in *United States ex rel. Walker* v. *Mancusi*, 467 F.2d 51 (2 Cir. 1972), *aff'g* 338 F.Supp. 311 (W.D. N.Y. 1971), we implicitly found segregation in a special housing unit to be a substantial deprivation, but held that the procedures employed by the Adjustment Committee "were sufficient to satisfy minimum requirements of 'fair play.'" 467 F.2d at 54, citing *Sostre* v. *McGinnis*, *supra*, 442 F.2d at 196. While we did not expressly hold that

segregation in a special housing unit constituted a substantial deprivation, we did not find fault with the district court's conclusion to that effect, 338 F.Supp. at 314. And despite the nominal difference between segregation in a special housing unit and keeplock, we note that the deprivations in the instant case were more substantial than those in *Walker*.[1]

Next, in *United States ex rel. Larkins* v. *Oswald*, 510 F.2d 583 (2 Cir. 1975), we assumed without discussion that if *Wolff* were to be applied retroactively it would govern proceedings leading to confinement in a special housing unit. We denominated the punishment in *Larkins* as "solitary confinement", 510 F.2d at 584, but it is unclear whether the confinement actually was "solitary" in the narrow sense of that term or a lesser form of punitive or disciplinary confinement. The district court opinion simply said that "[t]he [Adjustment] Committee's action was to confine Larkins in HBZ for seven days with loss of yard and recreation." 364 F.Supp. 1374, 1375 (W.D.N.Y. 1973). The case illustrates that the distinctions are too fine to draw.

Most recently we decided *Crooks* v. *Warne*, 516 F.2d 837 (2 Cir. 1975), and *Powell* v. *Ward*, 542 F.2d 101 (2 Cir. 1976), *aff'g* 392 F.Supp. 628 (S.D.N.Y. 1975). Both involved confinement in segreation or in a special housing unit. In both cases we affirmed district court orders which required advance written notice before disciplinary hearings where either kind of punishment could be imposed. *Powell* v. *Ward, supra*, 392 F.Supp. at 630; *Crooks* v.

[1] The conditions in the two types of confinement are similar except that, unlike the prisoners keeplocked in the instant case, the prisoners segregated in *Walker* received the minimum wages paid to inmates unassigned to jobs through no fault of their own, had commissary privileges, could receive packages from the outside, and had recreation during their first week of punitive confinement. 338 F.Supp. at 313.

Warne, supra, 516 F.2d at 839. Although in *Crooks* we stated that "[i]n every case involving disciplinary proceedings governed by *Wolff* [the prisoner] should receive written notice of the charges or concerns of the committee . . . ordinarily at least 24 hours before the hearing", 516 F.2d at 839, we implied that hearings at which any form of "custodial confinement" might be imposed would qualify as "disciplinary proceedings governed by *Wolff*". Both the panel in *Crooks* and the district judge in *Powell* noted the problem of distinguishing between "segregation" and "special housing", see 516 F.2d at 838 & n. 1; 392 F.Supp. at 630 & n. 2. As Judge Stewart stated in *Powell*, a sensible resolution of the problem is that the distinction is "unimportant" since "*Wolff* procedures apply to both special housing and segregation." 392 F.Supp. at 630 n. 2.

Based on our analysis of the cases discussed above, we find that our difficulties in trying to sort out the various and multiple forms of punishment employed by prison officials is matched only by the virtual absence of difference in harshness of impacts on the prisoners, despite the differing degrees of penalty originally contemplated by prison rules and regulations. See note 9 *infra*. We conclude that keeplock is not significantly different from the other forms of punishment which we have held to constitute substantial deprivations. Accordingly we hold that the imposition of keeplock by the Adjacent Committee must be pursuant to a hearing with minimal due process safeguards.

This brings us to the practical reason for considering keeplock for a period up to two weeks as a substantial deprivation, despite the obvious difference between that kind of limited punishment and the anxiety-producing "indeterminate" confinement dealt with in many of the other cases. Obviously, the longer the confinement, the more substantial the deprivation. But neither *Wolff* nor our own

cases carve out exceptions depending on the duration of the confinement. This may reflect the fact that in those cases the confinement could have been of indefinite duration.[8] In any event it is not necessary for us to decide whether terms of less than two weeks in keeplock would constitute a substantial deprivation under the Fourteenth Amendment. The State has seen fit to give a single body—the Adjustment Committee—the authority to impose keeplock of up to two weeks. To be workable, the procedural requirements applicable to the Board under the due process clause must depend upon the maximum penalty that may be imposed and not upon some lesser penalty that is imposed in any particular case. Here the original punishment of seven days keeplock was extended to two weeks without any further notice, interview or review. Upon the record before us, we see no principled basis for choosing an intermediate cut-off point for Adjustment Committee keeplock and preferring it over the State's determination of two weeks.[9]

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[8] For example the prison regulations involved in *Wolff* allowed confinement in a disciplinary cell "for as long as necessary". 418 U.S. at 552 n. 9.

[9] Furthermore, as plaintiffs point out, as a practical matter the Adjustment Committee cannot know before a hearing how much punishment will be imposed on a prisoner charged with misbehavior unless it has pre-judged the case. Since the Committee has the power to impose keeplock for a period up to two weeks, every hearing potentially involves the maximum term of keeplock. *Wolff* v. *McDonnell* sheds no light on this problem because their minor infractions could be dealt with informally and only infractions for which loss of good time or solitary confinement could be imposed came before the Adjustment Committee. Here the Committee can impose any punishment from loss of privileges to two weeks keeplock. Although the Committee probably can determine in advance of a hearing whether the charge, if substantiated at the hearing, is serious enough to warrant imposition of keeplock or only a lesser punishment such as loss of privileges, it is

(footnote continued on following page)

The remaining question is whether the court below erred in prescribing 24 hours advance written notice in all cases "involving keeplock". We hold that it did not.[10]

In holding that due process requires 24 hour advance written notice of the charges when an inmate is faced with loss of good time or solitary confinement, the Supreme

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(footnote continued from preceding page)

less probable that the Committee could determine in advance whether, for example, 4 days or 9 days keeplock is warranted as punishment. Such a pre-hearing determination would run counter to the State's own proclamations about the flexibility and counseling function of the Adjustment Committee hearing as opposed to the more clearly disciplinary function of the Superintendent's Proceeding. Compare N. Y. Code of Rules and Regulations, Part 252, with *id.* Part 253; see *Powell* v. *Ward, supra,* 392 F.Supp. at 629, where Judge Stewart noted that "[t]he Adjustment Committee Proceeding is 'said to be marked by flexibility and non-punitive intent in attempting to effectuate changes in inmate attitude,' whereas the Superintendent's Proceeding is 'solely disciplinary in nature.'"

We therefore decline to accept the State's invitation to modify the judgment of the district court so as to require 24 hours advance written notice of charges only before hearings at which more than 7 days keeplock may be imposed. We express no view, however, as to how we would rule in a case involving hearings on charges for which the maximum punishment were either loss of certain privileges or keeplock of a duration so short that it could not be considered a substantial deprivation. New York does not now provide an Adjustment Committee (or other disciplinary or adjustment official or tribunal) with such very limited powers.

[10] We wish to make clear however that nothing in this opinion or in the judgment below affects the present state of the law as to the timing of the hearing. If prison authorities determine that an inmate's continued presence in the general prison population poses a threat to his own safety or to the safety of others, they may confine such an inmate as long as a hearing follows as soon as is practicable. See *Crooks* v. *Warne, supra,* 516 F.2d at 839; *Bloeth* v. *Montanye,* 514 F.2d 1192, 1194 (2 Cir. 1975). In particular, nothing in the district court judgment or in this opinion relates to the keeplocking of plaintiffs immediately after the laundry-room incident on June 5 and until the Adjustment Committee hearing could be held.

Appendix A.

Court in *Wolff* reiterated that "[p]art of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact. 418 U.S. at 564, citing *In re Gault*, 387 U.S. 1, 33-34 & n.54 (1967). The Court also reiterated the teaching of *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961), that "'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action.'" 418 U.S. at 560. While we acknowledge that a prisoner's interest in not being keeplocked wrongfully is not as great as his interest in not being placed in solitary confinement wrongfully, we conclude that reason and our prior decisions dictate that the minimal burden on the State in providing advance written notice is outweighed by the interests of the charged prisoner. See *Crooks* v. *Warne, supra; Powell* v. *Ward, supra.*[11] We affirm the 24 hour notice provision of the district court judgment.

[11] Advance notice of charges has many salutary effects. It compels the charging officer to be more specific as to the misconduct with which the inmate is charged; it serves to narrow the inquiry at the hearing to the misconduct alleged; it informs the inmate of what he allegedly has done so that he can prepare a defense, if he chooses, to the specific charges set forth, based on whatever evidence he can muster, given the limited time available and the lack of an opportunity to interview or call witnesses; and it aids the fact finder to reach an informed decision. Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, *supra*, at 868, 873. The notice requirement also assures a degree of fairness in the proceedings so that an inmate is not summarily brought before a three-member panel and required on the spot to explain vague charges set forth in a misbehavior report which hehas never seen.

We find no merit in defendants' contention that Judge Stewart's decision destroys the so-called "flexibility" of the "two-

(footnote continued on following page)

Appendix A.

(2) *Scope of the Judgment*

The parties have raised some questions as to whether the last paragraph of the judgment is injunctive in character rather than merely declaratory. We construe it as declaratory only. The district court opinion states that plaintiffs are to be granted "declaratory relief under their first cause of action". 425 F.Supp. at 393. This is the only claim before us. The judgment itself, in the same paragraph that provides "plaintiffs' first claim for relief is granted" goes on to provide unequivocally that "plaintiffs' prayer for equitable and monetary relief respecting this claim is denied". Clearly the judgment does not grant injunctive relief.

Even as to declaratory relief, moreover, the fact that this suit is not a class action precludes the judgment from being applied to prisoners other than the three named plaintiffs. The judgment therefore is modified to apply only to Adjustment Committee proceedings involving these plaintiffs.

Affirmed as modified. No costs.

(footnote continued from preceding page)

tiered disciplinary system" in New York's correctional institutions. The Adjustment Committee has the power to mete out punishment that is comparable in severity, if not in duration, to the sanctions at the disposal of the Superintendent's Proceeding officer. If the Adjustment Committee were truly one step in a two-tiered disciplinary system, its sanctions would not include the substantial punishment given to the prisoners in the instant case, but would be limited to the power to impose minor penalties such as loss of privileges. Furthermore, the claimed remedial and guidance purposes of the Adjustment Committee proceeding, if in fact an integral part of the hearing procedure, might validly distinguish the two procedures and lend credence to the contentions of the corrections officials as to the desirability of maintaining flexibility. The record in the instant case, however, indicates that the Adjustment Committee was concerned primarily with certain bare facts such as whether the particular inmate was present during the incident in question as charged in the misbehavior report.

Appendix B.

Khalieb McKINNON et al., Plaintiffs,

v.

J. W. PATTERSON et al., Defendants.

No. 73 Civ. 3998

United States District Court,
S. D. New York.

Sept. 13, 1976.

OPINION

STEWART, District Judge:

Plaintiffs, Khalieb McKinnon, Laurence Mincy, and David Wheeler, have brought this civil rights action pursuant to 42 U.S.C. § 1983 to redress alleged deprivations of their constitutional rights.[1] Named as defendants are J. W. Patterson, who was the Superintendent of Eastern Correctional Facility in June of 1973 ("Eastern"), Joseph Perrin and Robert E. McClay, who, in June of 1973, were Deputy Superintendents at Eastern of Security and of Program Services respectively, Peter Preiser, then Commissioner of New York State's Department of Corrections, and Benjamin Ward, present Commissioner of New York State's Department of Corrections. Plaintiffs claim defendants violated their Fourteenth Amendment rights by imposing substantial deprivations upon plaintiffs without providing adequate procedural safeguards.

[1] Plaintiffs, who initially brought this action *pro se*, were represented at trial by Gage Andretta, Esq., and Richard Fuchs, Esq. The court thanks and commends Messrs. Andretta and Fuchs for providing competent and distinguished representation.

Appendix B.

In June of 1973, the plaintiffs were incarcerated at Eastern, a "medium" security institution. 7 New York Code of Rules and Regulations ("N.Y.C.R.R.") § 100.55 (b).[2] All were assigned to work in Eastern's laundry room. On June 5, 1973, a dispute arose between plaintiffs and defendants; plaintiffs claim that defendants altered the laundry room rules by abruptly prohibiting them from doing personal laundry. [Trial Transcript,[3] pp. 14-16]. Defendants testified that plaintiffs had attempted to use the laundry to do other inmates' laundry in return for compensation ("contract work"), a clear violation of prison rules. [Tr. pp. 162-165, Plaintiffs' Ex. 55 ("Inmate Rulebook", p. 4), Defendants' Ex. H ("Rules and Regulations at Eastern", Rule 18), and Ex. G]. All parties agree that a dispute occurred and that, subsequent to the dispute, the plaintiffs were confined to their cells ("keeplocked"). Correction officers filed "misbehavior" reports about plaintiffs and, some 15-20 days after the laundry incident occurred, plaintiffs were transferred from Eastern to other facilities. Mincy was sent to Clinton Correctional Facility ("Clinton"); McKinnon was transferred to Attica Correctional Facility ("Attica"), and Wheeler was sent to Great Meadows Correctional Facility ("Great Meadows"). Each of these institutions is classified as a "maximum" security facility. 7 N.Y.C.R.R. §§ 100.5, 100.15, and 100.40.

Plaintiffs claim that the transfers were punitive measures which were imposed as a result of the laundry room incident. Plaintiffs argue that their keeplock and transfers worked substantial deprivations and that they were entitled to but did not receive adequate notice of or impartial hearings on the charges against them prior to im-

[2] Unless otherwise indicated, all citations to Title 7 of N.Y.C.R.R. refer to the regulations in effect in 1973.

[3] Hereafter, references to the trial transcript will be indicated by use of the abbreviation "Tr."

position of the punishments. See *Sostre* v. *McGinnis,* 442 F.2d 178 (2d Cir. 1971), *cert. denied,* 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972). See also *Newkirk* v. *Butler,* 499 F.2d 1214 (2d Cir. 1974), *vacated as moot,* 422 U.S. 395, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975). Specifically, plaintiffs seek a declaration that 1) the "adjustment committee procedure," an administrative hearing conducted by defendants did not comply with New York law or with the constitutionally mandated requirements of *Sostre* v. *McGinnis, supra;* 2) the sanction of being keeplocked for some 15 days constituted a "substantial deprivation" within the prison setting and thus, before its imposition or immediately upon imposition, a fair and adequate hearing was and is required, and 3) defendants had personal knowledge of, or should have known of these constitutional defects and are thus to be held personally liable for plaintiffs' injury. Plaintiffs also request that this court 1) interpret New York State's regulations to require that, prior to a prisoner's transfer for misbehavior, a "superintendent's proceeding" [7 N.Y.C.R.R. § 253 *et seq.*] be held; 2) require that, before prisoners are transferred to a more restrictive institutional setting, a fair hearing be held; 3) remove transfer recommendations from the lists of permissible actions which the adjustment committee may recommend; 4) require 24-hour notice of charges and hearings whenever an inmate is to be keeplocked for more than 3 days; 5) require that no adjustment committee member may participate in a hearing which deals with an incident in which that member had any involvement, and 6) order that plaintiffs' records be expunged so that any notations about the laundry room dispute and discipline related to it be deleted.

In addition to the equitable relief outlined above, plaintiffs seek monetary compensation for the constitutional deprivations, their lost wages, and their mental anguish.

Subsequent to the trial of this action on May 24-26, 1976, the Supreme Court issued its opinions in two cases which involve the rights of state prisoners to be given notice and hearings prior to the transfer from one prison institution to another. See *Montanye* v. *Haymes,* 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1975) and *Meachum* v. *Fano,* 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). Justice White, writing for the majority, held that the Due Process Clause of the Fourteenth Amendment does not, in itself require hearings in connection with transfers from one institution to another "whether or not [the transfers] are the result of the inmate's misbehavior or may be labeled as disciplinary or punitive." *Montanye* v. *Haymes, supra* at 242, 96 S.Ct. at 2547. The Court determined that a prisoner, seeking procedural protections for prison transfers, must look first to state law; the Due Process Clause only guaranteed that, once a right was established under state law, it would not be "arbitrarily abrogated." *Meachum* v. *Fano, supra* at 226, 96 S.Ct. at 2539, (citations omitted). Interpreting New York State's prison regulations in *Montanye* v. *Haymes,* Justice White concluded that, under New York law [N.Y.Corr.Law § 23(1)], a prisoner did not have a right to remain in any particular facility and had "no justifiable expectation that he would not be transferred unless found guilty of misconduct." *Montanye* v. *Haymes, supra* at 243, 96 S.Ct. at 2547.

On the bases of the holdings in *Montanye* v. *Haymes* and *Meachum* v. *Fano,* defendants urge that we enter judgment in their favor. [Supplemental Memorandum of Law, June 30, 1976.] Defendants assert that, under the Supreme Court's interpretation of New York law, no state right and no constitutionally protected interests were infringed upon when plaintiffs were transferred from Eastern. [See *Montanye* v. *Haymes, supra,* 239-244, 96 S.Ct. 2547.] Further, defendants contend that plaintiffs' other claim, relating to the alleged inadequacy of the adjustment committee hear-

ings which were held, is also decided by the Supreme Court's conclusions in the *Haymes* and *Fano* cases; defendants argue that, if no federally protected remedy exists to insulate inmates from the deprivations suffered when transferred, the "minor deprivations" [Supplemental Memorandum at p. 4] imposed by the adjustment committee cannot be federally protected, and thus, no due process requirements can be constitutionally mandated.

Plaintiffs submit that *Haymes* and *Fano* announced new rules of law, not foreshadowed by earlier holdings, and that these rulings should not be given retroactive application. See *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). See also *Wolff* v. *McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). In support of this argument, plaintiffs note that the events at issue here occurred in 1973, three years prior to the *Haymes* and *Fano* decisions; thus, the standards set forth in *Sostre* v. *McGinnis, supra,* should govern the adjudication of this action. Plaintiffs direct the court's attention to several written documents of defendants and of New York State which indicate that defendants, as well as plaintiffs, believed that the *Sostre* v. *McGinnis* ruling was applicable to these events. First, plaintiffs cite the brief submitted by New York State, in its appeal in *Newkirk* v. *Butler, supra.* New York stated that its rules required hearings prior to disciplinary punishment; when prisoners were transferred for reasons of misconduct,

> ". . . the inmate must, before or shortly after such transfer, be given notice of the gravamen of the misconduct and an opportunity to be heard in relation thereto." [Plaintiffs' Supplemental Post-trial Memorandum at p. 3.]

Second, in this action, defendants have consistently maintained that no hearings were required because plaintiffs

were not transferred for punitive reasons but for "management" and "administrative" purposes. Thus, defendants have argued that "the applicable law at the time for disciplinary proceedings . . . *Sostre* v. *McGinnis*" [Defendants' Post-trial Brief at p. 26] did not require hearings here.

Justice Burger discussed the question of retroactive application of a constitutionally mandated decision in *Lemon* v. *Kurtzman,* 411 U.S. 192, 197-201, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973) ("Lemon II").

> "The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is 'among the most difficult . . .' [T]he effect of a given constitutional ruling on prior conduct 'is subject to no set "principle of absolute retroactive invalidity" but depends upon a consideration of "particular relations . . . and particular . . . conduct . . . of rights claimed to have become vested . . ."; and "of public policy . . ."'" *Lemon II, supra* at 198-199, 93 S.Ct. at 1468. (citations omitted).

See also *Gosa* v. *Mayden,* 413 U.S. 665, 673, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973), *Chevron Oil* v. *Huson, supra,* and *Dematteis* v. *Eastman Kodak Co.,* 520 F.2d 409 (2d Cir. 1975). While these cases do not discuss the precise question here, which is to determine whether holdings which limit a federal constitutional remedy should be applied retroactively, the opinions set forth the relevant considerations to guide us.

[1] The preliminary question is whether a ruling of the Supreme Court "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly fore-

shadowed . . ." *Chevron Oil* v. *Huson, supra,* 404 U.S. at 106, 92 S.Ct. at 355 (citations omitted).[4] We agree with plaintiffs that the pronouncements of the Supreme Court in *Haymes* and *Fano* are "new" and do overrule the precedents developed in the lower courts of this circuit which had determined that the Due Process Clause, in itself, applied to all situations in which a state prison authority imposed punitive sanctions; thus, before a disciplinary transfer, the state had to afford the person to be punished an opportunity to be heard.[5]

Having determined that the rulings are new, we turn to the other factors which are relevant to the question of retroactive application. We are directed to look to the purpose of the new rule in order to decide whether retrospective operation "will further or retard its operation." *Lemon II, supra,* 411 U.S. at 199, 93 S.Ct. at 1469 (citations omitted). The purpose of the new holdings is, we believe, to direct federal courts to refrain from overseeing state prison administrative decisions, where federal constitu-

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[4] In this regard, it is not necessary that the ruling overturn Supreme Court precedent for "[o]nly a small number of the appealed federal cases are ever reviewed by the Supreme Court." *United States* v. *Bowen,* 500 F.2d 960, 976 (9th Cir. 1974) (citations omitted), *aff'd.* 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975).

[5] See, e. g., *United States ex rel. Haymes* v. *Montanye,* 505 F.2d 977, 980 (2d Cir. 1974) [rev'd, *Montanye* v. *Haymes,* 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466], holding that "[w]hen harsh treatment is meted out to reprimand, deter, or reform an individual, elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling," and *Newkirk* v. *Butler,* 499 F.2d 1214, 1218 (2d Cir. 1974), *vacated as moot,* 422 U.S. 395, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975), holding that ". . . a substantial deprivation of benefits and privileges within the prison walls itself entitles a prisoner to some form of due process . . .".

tional rights are not at issue.[6] The Supreme Court expressly declined to place the Due Process Clause

> "astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges." *Meachum* v. *Fano, supra* at 228, 96 S.Ct. at 2540.

Thus, we believe that, if we were to decline to apply the rulings retroactively, we would be retarding their operation.

Another consideration in retroactivity is the degree of reliance the parties have placed upon the old rule. Here, we are confronted with a situation distinct from most in which courts have considered the problem of retroactive application.[7] While both sides relied upon the earlier holdings, defendants believed that their actions were proper under *Sostre* v. *McGinnis* and that they were not required to provide hearings before transferring prisoners because such transfers did not work "substantial deprivations." Plaintiffs rely upon the prior case law to obtain redress for past actions taken against them; plaintiffs do not allege that their own actions were authorized by the prior law.

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[6] Where a "fundamental constitutional guarantee" is involved, "federal courts will discharge their duty to protect constitutional rights." *Procunier* v. *Martinez,* 416 U.S. 396, 405-406, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974).

[7] Compare *Lemon II,* in which the parties had acted pursuant to a state statute later declared to be unconstitutional. See also *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204, 90 S.Ct. 1190, 26 L.Ed.2d 523 (1970), in which the Court had to determine whether to invalidate an election which was held under laws later held to be discriminatory, and *Linkeletter* v. *Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), in which the Court declined to apply the exclusionary rule announced in *Mapp* v. *Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) to convictions which had become final before its rendition.

[2, 3] In light of the fact that the purpose of the *Haymes* and *Fano* rulings would be impeded if not applied retroactively, we believe that we must apply those rulings to the events at issue in this lawsuit. Thus, we conclude that, as the Supreme Court has construed New York law to establish no expectation of a right to remain in a particular institution, plaintiffs have not suffered a Fourteenth Amendment deprivation because they were transferred from one institution to another without having first had an opportunity to be heard. Plaintiffs' fourth claim for relief against the defendants is dismissed.

We turn now to plaintiffs' other causes of actions. Plaintiffs' second claim for relief asserts that the transfers had and have the effect of "deterring and preventing plaintiffs from the free exercise of their rights of speech, petition, assembly and association under the First and Fourteenth Amendments." [Third Amended Complaint, ¶ 28.] As a third claim for relief, plaintiffs allege that the transfers occurred. [Tr. pp. 41-47, 82-87, 133-134, Plaintiffs' Ex. 1, suit." [Third Amended Complaint, ¶ 31] which they had begun after having been confined to their cells but before the transfers occurred. [Tr. pp. 41-47, 82-87, 133-134, Plaintiffs' Ex. 1, Defendants' Ex. A.]

Justice Steven's dissenting opinion in *Montanye* v *Haymes, supra,* 427 U.S. at 244, 96 S.Ct. at 2548, interprets the majority holding as not precluding such claims, which allege that transfers are made "in retribution for [the] exercise of protected rights." Thus, we do not dismiss plaintiffs' second and third claims but turn to a review of the evidence to determine if plaintiffs have shown that defendants were motivated to transfer plaintiffs as retribution for plaintiffs' exercise of First and Fourteenth Amendment rights.

Both plaintiffs and defendants agree that the initial event which sparked the controversy was the dispute in the

laundry room. [Tr. pp. 11, 128, 152, 315.] Further, both sides concur that the dispute arose when plaintiffs and defendants disagreed about prison policy and rules relating to inmates washing their own and other inmates' personal laundry. [Tr. pp. 20, 140, 354-355.] Credible testimony also establishes that, because of the disagreement over prison rules, the inmates did not do their assigned work in the laundry on June 5, 1973. [Tr. pp. 19, 68, 89, 163, 308.]

[4-6] Inmates do not have a constitutionally protected right to perform any particular kind of work in state institutions or to protest prison regulations by a work stoppage. See *Paka* v. *Manson,* 387 F.Supp. 111 (D.Conn. 1974). Thus, because we find on the basis of credible evidence that the plaintiffs were transferred primarily because of their participation in the laundry room incident [Tr. pp. 27, 232, Plaintiffs' Ex. 13, 15, 20], we decline to hold that the transfers were motivated by defendants' desire to punish plaintiffs for exercising constitutionally protected rights. We reach this conclusion despite the fact that plaintiffs have alleged that they were denied their constitutionally protected right of access to the courts. See *Procunier* v. *Martinez,* 416 U.S. 396, 419, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) and *Butler* v. *Preiser,* 380 F.Supp. 612, 620 (S.D.N.Y. 1974). Plaintiffs claim that, before they were transfered from Eastern, they had drafted a complaint seeking to enjoin the transfer [Tr. p. 85, Plaintiffs' Ex. 1, Defendants' Ex. A]; that action became moot when the transfers occurred. Second, plaintiffs allege that, after they were transferred, they were unable to confer with each other and thus the prosecution of this action was delayed. [Tr. p. 87.] However, both of these claims relate to the *effect* of the transfer and not to defendants' motivation for ordering the transfers. As plaintiffs have not shown that the transfers were prompted by defendants' de-

sire to deter plaintiffs from bringing claims to court, plaintiffs' second and third claims for relief are dismissed.[8]

[7, 8] Finally, we come to plaintiffs' first cause of action, which seeks redress for the allegedly inadequate hearing procedures which were provided by defendants prior to the imposition of keeplock. [Third Amended Complaint, ¶¶ 22-25.][9] This cause of action is not precluded by the Supreme Court decisions in *Montanye* v. *Haymes* and *Meachum* v. *Fano* because New York State law provides that certain procedures be followed when an inmate is subjected to confinement in his or her cell. See 7 N.Y.C.R.R. §§ 250-252. Thus, the Due Process Clause applies to "insure that the state-creater right is not arbitrarily abrogated." *Meachum* v. *Fano, supra,* 427 U.S. 226, 96 S.Ct. 2539, 49 L.Ed.2d 451 (citations omitted). Furthermore, under the governing federal law of the time, *Sostre* v. *McGinnis, supra,* "substantial deprivations" could not be imposed unless a fair and rational inquiry were conducted. Thus, as confinement to a cell for fourteen days constitutes a "substantial deprivation."[10] we must scrutinize the manner in which the state reached its decision to keeplock

[8] Testimony by plaintiffs McKinnon and Miney that a civilian employed at Eastern as a notary public declined to notarize one of two *pro se* complaints [Tr. pp. 43-44, 84-87, Plaintiffs' Ex. 2] is insufficient to establish that defendants acted to block plaintiffs from bringing their claims to court.

[9] A the conclusion of the trial, plaintiffs withdrew their fifth claim for relief, which alleges that they (who are all black) were "deliberately and intentionally treated more harshly by defendants than white inmates in the prison had been treated . . . solely because of the plaintiffs' race." [Third Amended Complaint, ¶ 40.]

[10] See *United States ex rel. Larkins* v. *Oswald,* 510 F.2d 583 (2d Cir. 1975), *Gilliard* v. *Oswald,* # 73 Civ. 249 (N.D.N.Y., July 22, 1976), and *United States ex rel. Walker* v. *Mancusi,* 338 F.Supp. 311 (W.D.N.Y. 1971), *aff'd.* 467 F.2d 51 (2d Cir. 1972).

plaintiffs. We must determine if the prisoners were confronted with the accusations and the evidence against them and afforded a reasonable opportunity to explain their actions. *Sostre* v. *McGinnis, supra,* 442 F.2d at 198.[11]

To ascertain whether New York officials complied with the procedures set forth in the state's regulations and with due process requirements, we turn to the evidence presented at trial. Based upon the testimony and exhibits, we make the following findings of fact.

1. The dispute in the laundry on June 5, 1973, at Eastern was an unusual event in that institution's history. [Tr. pp. 289-293.]

2. After the inmates who had been present in the laundry room during the dispute returned from lunch, they were confined to their cells. [Tr. pp. 23, 69-71, 129, 310.]

3. Misbehavior reports were written about all the inmates who were present in the laundry. [Tr. p. 153, Plaintiffs' Ex. 38-54.]

4. Within a day of the incident, three prison personnel, correction officer George Barthel, Lieutenant Demskie, and

[11] We do not read *Haymes* and *Fano* as precluding inquiry into the hearing afforded before disciplinary sanctions involving deprivations of liberty are imposed. We note that *Haymes* and *Fano* did not overrule the Supreme Court's recent decisions concerning prison disciplinary hearings [See, e.g., *Baxter* v. *Palmigiano,* 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976) and *Wolff* v. *McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)] but dealt instead with the question of hearings prior to transfer from one prison facility to another. Justice White evaluated the transfer question in a context where no constitutional guarantee established that a state must provide alternative prison settings and where no state law entitled inmates to expect assignment to any particular facility.

civilian employee Edward Hartley, interviewed approximately one-third of the inmates who had been keeplocked. After the interviews, these inmates were released from keeplock. The misbehavior reports written about them were apparently withdrawn. [Tr. pp. 155-158, 166, 175, 187-188, 266-267, 376.]

5. In addition to the individual misbehavior reports filed, the employees who witnessed the incident in the laundry room filed reports describing the events. [Tr. pp. 243-244, Defendants' Ex. C, E] One of these reports was filed several weeks after the incident occurred. [Tr. p. 359, Defendants' Ex. F]

6. Laurence Mincy was interviewed by the adjustment committee on June 7, 1973. After a brief discussion, Mincy was told that he would be confined to his cell for seven days, would be interviewed again at the end of that time, and that the committee intended to recommend a change in his job assignment. [Tr. pp. 26-29, Plaintiffs' Ex. 30.]

7. Mincy was not interviewed again by the adjustment committee before he was transferred from Eastern on June 20, 1973. [Tr. p. 29.]

8. On June 7, 1973, Khalieb McKinnon appeared before the adjustment committee. He was shown a copy of the charges relating to the laundry room dispute; after he spoke briefly about his involvement, the committee told him that they would recommend he be kept in keeplock for seven days, his job assignment changed, and he be returned for another interview. [Tr. pp. 72-82, 88, Plaintiffs' Ex. 28.]

9. McKinnon was not interviewed again by the adjustment committee. [Tr. p. 88.]

10. David Wheeler met with the adjustment committee on approximately June 7, 1973. After a brief exchange, Wheeler was told he was to be confined to his cell for seven days and would then be returned to the adjustment committee for further interviewing. [Tr. pp. 129-131, Plaintiffs' Ex. 35.]

11. Wheeler was not interviewed again by the adjustment committee. [Tr. pp. 130, 212.]

12. The plaintiffs did not have the opportunity of bringing other persons to speak to the adjustment committee to substantiate the plaintiffs' description of the causes of the laundry dispute. [Tr. pp. 77, 131, 264.]

13. None of the plaintiffs were informed that they could request that the superintendent review the recommendations of the adjustment committee. [Tr. pp. 29, 77, 131.]

14. The evidence does not establish that the adjustment committee was directly responsible for the transfers or that it did recommend changes in programs for the plaintiffs.[12]

15. When keeplocked, McKinnon, Mincy, and Wheeler were confined to their cells. They had the use of their personal property. [Tr. pp. 98, 138, 250.] They had very limited access to showers and physical activity. [Tr. pp.

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[12] We note that the "classification committee evaluations" of plaintiffs, which recommended transfer to maximum security facilities, mention the plaintiffs' participation in the laundry room incident as indicative of their poor adjustment to a medium security facility. [Plaintiffs' Ex. 14, 15, 20]. However, the evidence does not establish that it was the adjustment committee which conveyed this information to the classification committee either directly or through the program committee. Further, there is no evidence that the transfers occurred in a manner which violated state law.

79, 108, 137.] They could not participate in the normal routine of the prison, work at their assigned jobs, receive wages for such work, or take part in educational offerings. [Tr. pp. 32, 91, 131, 138.] They spent from 23 to 24 hours per day in their cells. They were denied contact with other inmates during their confinement.

New York State requires that

> "[a]ll control of inmates' activities, including disciplinary action, must be administered in a completely fair, impersonal and impartial manner and must be as consistent as possible (given the need for individualized decisions)." 7 N.Y.C.R.R. § 250.2(d).

Further,

> "[d]isciplinary action must never be arbitrary or capricious, or administered for the purpose of retaliation or revenge." 7 N.Y.C.R.R. § 250.2(e).

We find that the manner in which defendants handled the disciplinary problem which arose in June of 1973 at Eastern complied in many but not all respects with New York State regulations.

[9] New York empowers correction officers who reasonably believe that there is an imminent threat to the security of an institution or to the safety of inmates to confine inmates to their cells. 7 N.Y.C.R.R. § 251.-6(a). Thus, the officers who keeplocked plaintiffs on June 5 were not in violation of New York regulations. We find that they had reasonable grounds to conclude that the unusual events of that morning might provoke further disruption and that locking inmates in their cells would be proper. The officers were not under any obligation to inform inmates in advance of the keeplock that confinement was planned.

Once an officer confines an inmate, he or she must file a report with the superintendent of the facility. 7 N.Y.C.R.R.

§ 251.6(d). Here, reports were made, and some were forwarded to the adjustment committee, as required under 7 N.Y.C.R.R. § 252.3(b)(1).

The adjustment committee, which consists of three State employees who are designated by the Superintendent [7 N.Y.C.R.R. § 252.1] is required to review the reports to "ascertain the full and complete facts and circumstances of the incidents of inmate misbehavior." 7 N.Y.C.R.R. § 252.-2(a). The committee must determine if the "facts and circumstances are set forth with sufficient clarity . . . to furnish a basic understanding of the matter." 7 N.Y.C.R.R. § 252.4(c). "The committee also shall endeavor to obtain from the inmate as full and complete an explanation of his behavior in the situation as possible." 7 N.Y.C.R.R. § 252.-4(e).

Here, as required under the regulations, the adjustment committee interviewed each inmate at its first meeting following the date of the inmate's confinement.[13] 7 N.Y.C.R.R. § 252.3(f). No specific procedures for the interview are set forth in the regulations. The committee is given the discretion to determine what information it requires [7 N.Y.C.R.R. § 25.33(d)] and to elicit more information when necessary. Further, under New York law, members of the adjustment committee are chosen by the superintendent; there is no requirement that the members have no prior knowledge or involvement with the misbehavior reports which they review.[14]

[10] We find that, while the actions of the adjustment committee in interviewing the plaintiffs complied with the New York's regulations, described above, the committee failed to provide the procedural safeguards required under the Constitution. As set forth in *Sostre* v. *McGinnis*, *supra*,

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[13] There was no evidence that the adjustment committee had a regular meeting earlier than June 7, 1973.

[14] Compare 7 N.Y.C.R.R. § 253.2(d).

when a prisoner is confronted with the potential imposition of a substantial deprivation, certain procedural protections attach. Here, New York State did not give plaintiffs the opportunity to be informed of the charges against them in advance of the hearings or to have the incident reviewed by persons who had no prior involvement with the event.[15] Thus, the "interview" did not provide the type of hearing required before the imposition of the punishment which the adjustment committee ordered.

[11, 12] The subsequent actions of the adjustment committee were proper under New York law, and except for our conclusion as to the inadequacy of the hearings prior to the imposition of keeplock, did not violate due process. Under New York regulations, the adjustment committee could recommend to the superintendent that an inmate's program be reappraised, 7 N.Y.C.R.R. § 252.4(b)(7). In making this recommendation or in taking any other action, the committee, which need not make any findings of violation of prison policy, must focus upon "the need for maintaining discipline and order within the facility." 7 N.Y.C.R.R. § 252.5(b). If the committee believes that an inmate's activities must be restricted, it may recommend different sanctions, including confining an inmate to his or her cell for a period not exceeding two weeks, 7 N.Y.C.R.R. § 252.5. After imposition of such restriction, the

> "committee *may* direct that the inmate appear before it at a specified time during the period of the restriction, or at the expiration thereof, . . . Where the committee is of the opinion that . . . a change [in attitude] has not occurred, it may add restrictions . . ." 7 N.Y.C.R.R. § 252.5(f) (emphasis added).

[15] Lieutenant Demskie, who sat on the adjustment committee, was also present outside the laundry room on June 5th and participated in the ad hoc panel's interviews of some inmates.

Thus, despite the fact that plaintiffs were told that they would be returned to the committee in seven days, the failure to do so did not breach a statutory mandate. Further, while plaintiffs complain that they were not informed of their right to initiate a review of the adjustment committee's actions by means of a written request to the superintendent [7 N.Y.C.R.R. § 270.1(c)], the regulations governing adjustment committee procedures do not require that the committee inform inmates of this option.[16]

[13] In some respects, however, the administration at Eastern did depart from New York regulations. First, and most importantly, the regulations do not provide for an ad hoc panel of employees selecting some inmates for private interviews and determining to withdraw misbehavior reports. We find that such procedures contradict the "general policies on discipline," which mandate that disciplinary administration be "fair . . . impartial . . . and as consistent as possible . . ." [7 N.Y.C.R.R. § 250.2 (d)]. Similarly, the fact that two inmates were reinterviewed by the adjustment committee [Plaintiffs' Ex. 25, 36] while plaintiffs were not, undermines the regulations' philosophy of even-handed action. Finally, the adjustment committee's failure to interview plaintiffs after informing them of scheduled meetings did not comport with the description of committee's role of giving "guidance to the inmate." 7 N.Y.C.R.R. § 252.5(c).

[14] We conclude that, because some inmates were interviewed and released under informal procedures, plaintiffs were deprived of their legal "interest or right" [*Meachum* v. *Fano, supra,* at 228, 96 S.Ct. at 2540] under New York

[16] This regulatory omission, in our view, limits the usefulness of an inmate's right to seek review by the superintendent but does not, in itself, violate due process.

law to have prison discipline applied under established procedural mechanisms. Further, we find that the interviews given by the adjustment committee were constitutionally insufficient. We therefore grant plaintiffs declaratory relief under the first cause of action and hold 1) confining an inmate to his or her cell for two weeks is a substantial deprivation; 2) prior to the imposition of such deprivation, due process requires a fair hearing, and 3) that the procedures accorded to plaintiffs prior to keeplock violated their Fourteenth Amendment rights. Accordingly, we order that, in future adjustment committee proceedings involving keeplock, 1) formal written notification of the charges must be given to the inmate at least 24 hours before the hearing and 2) no one with direct, personal involvement in the incident upon which the complaint against the inmate is based may sit on that case. See *Baxter* v. *Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), *Wolff* v. *McDonnell*, *supra*, *Sostre* v. *McGinnis supra*. See also *Powell* v. *Ward*, 392 F.Supp. 628 (S.D.N.Y. 1975), *app. pending*.

[15] Plaintiffs have also requested that we order that any reference to the laundry room incident and the subsequent disciplinary action be expunged from their records. We decline to do so because it is undisputed that plaintiffs were present in the laundry room at the time and participated in some manner in that dispute. Second, plaintiffs have not demonstrated that the existence of a record of the laundry dispute has caused them harm or that it will hinder their chances for parole.

[16] We turn now to the question of a monetary award. Plaintiffs argue that the evidence established that defendants failed to act reasonably in light of the existing legal requirements and are therefore liable for damages. See *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d

214 (1975) and *MukMuk* v. *Commissioner of Corrections*, 529 F.2d 272 (2d Cir. 1976) U.S. app. pending, U.S. (1976). Defendants' actions relating to the adjustment committee proceedings do not, in our opinion, demonstrate failure to act reasonably. Those interviews, while not satisfying the standards of *Sostre* v. *McGinnis*, *supra*, did comply with New York regulations in effect at that time; we believe it would be inappropriate to assess damages against defendants for adhering to those procedures. See *MukMuk* v. *Commissioner of Corrections*, *supra*, 529 F.2d at 278. Further, while the activities of the ad hoc panel which interviewed some inmates and released them from keeplock cannot be characterized as a good faith attempt to comply with legal requirements, plaintiffs have not been damaged by those actions. Thus, we decline to assess monetary damages against defendants. No costs to either party.

So Ordered.